In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1874

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JOSEPH MEEHAN,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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Opinion Below.

The opinion of the court below (App. B) is reported at Mass. Adv. Sh. (1979) 710, 387 N.E. 2d 527.

Jurisdiction.

The judgment of the court below was entered on March 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Whether the court below applied correct constitutional standards in holding a confession to be involuntary under the Fifth Amendment in the absence of any evidence of actual coercion?

2. Whether real evidence obtained pursuant to a search warrant based upon an illegally obtained confession need be suppressed where the police had other legally obtained evidence to support the warrant?

3. Whether a spontaneous inculpatory statement by the respondent to his mother need be suppressed as a product of the initial illegally obtained statement?

Constitutional Provisions Involved.

Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1.

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

On August 11, 1976, the Suffolk County grand jury indicted Joseph Meehan for the murder of Mary Ann Birks. Prior to trial, the respondent moved to suppress inculpatory statements which he had made and articles of his clothing. After a pretrial hearing, the judge filed a memorandum of decision granting the motion in part and denying it in part, suppressing statements made to the police and a pair of pants seized pursuant to a search warrant and allowing a statement made by the respondent to his mother. The Commonwealth and the respondent then applied for leave to take interlocutory appeals pursuant to Mass. Gen. Laws, c. 278, § 28E. The applications were granted by a single justice of the Supreme Judicial Court.

On appeal, the Supreme Judicial Court affirmed the order granting suppression but reversed the denial of the respond-

ent's motion to suppress his statement to his mother. *Commonwealth* v. *Meehan*, Mass. , 387 N.E. 2d 527 (1979).

Statement of Facts.

The body of the victim was found on the front lawn of a home in the Hyde Park section of Boston in the early morning hours of June 11, 1976. Her face and head were covered with blood and a large rock found nearby was also bloodied. Police officers immediately attempted to interview people who lived in the vicinity or were known to have been at Cleary Square, a nearby gathering place, on the previous night. Mary Crowley, a neighbor, told the police in a taped interview that she had been awakened at approximately 2 A.M. on that morning. She heard a woman scream, "Don't. Please don't," and then scream wordlessly. Mrs. Crowley's daughter, Claire Wilde, who was also staying at that address, corroborated Mrs. Crowley's account and added that she, Wilde, had looked out the window and seen a white male walk by the house. Although she did not see his face, she described him as about five feet ten inches, dark-haired, slender, in his mid-twenties, and wearing faded jeans, with the sleeves of his shirt rolled up. The man returned a few minutes later, she said, and Mrs. Wilde heard the sound of a large boulder being thrown on the lawn.

Later in the morning the police interviewed, at the Hyde Park police station, four persons who had been in Cleary Square the previous evening. One of them, Joseph Ventola, who was acquainted with the victim, said that he had seen her around midnight on the steps of Christ Church at 1220 River Street. With her was a man whom Ventola described as being in his late teens, skinny, dark-haired and shirtless. A second

witness, John Carroll, said that he had seen the victim on the church steps and that she was with Joseph Meehan, whom he knew. Carroll described Meehan as eighteen or nineteen years old, dark-haired, and wearing a print shirt with rolled-up sleeves and sneakers.

During the course of Carroll's interview, he looked out the window of the first floor room in the police station and saw the respondent on Hyde Park Avenue. He pointed him out to the police officers. Detective Solari passed through the open first floor window to the street and officers Cannon and Russo went out the front door. Russo proceeded up the street on foot and Solari and Cannon came in a cruiser. Officer Cannon told the respondent they were investigating an assault and that they had been told he had been in the vicinity on the previous evening. They asked the respondent if he would accompany them to the station for an interview. The respondent said he was willing to go, but expressed concern that he would be late for an appointment to pick up his unemployment check. The officers said that they would drive him, should he be delayed. The respondent thereupon opened the cruiser door and sat down in the back. The respondent was 18 years old, five feet six inches, and was wearing a print shirt with the sleeves rolled up and cut-off dungarees.

The respondent was taken to the station, where he was interviewed by Detective Solari. Solari noticed red stains on the respondent's sneakers. When Solari asked him about them, the respondent explained that it was probably mud. Solari suggested that it looked like blood. The respondent then said that the stains were from a fight he had been in several days earlier with a George Quish. Solari asked to see the sneakers and the respondent gave Solari his left sneaker. Solari took the sneaker, left the room, and showed it to Sergeant Feeney, who agreed that there were blood stains. (A subsequent chemical test showed that the stains were blood.) Quish, who was also

being interviewed in the station at the same time, said he had not been in a fight recently. Feeney then told Solari to arrest the respondent and give him his *Miranda* warnings, which he did.

Later that morning, at about 11:20 A.M., the respondent was passed on to Sergeant Kelley, with Officers Feeney, Russo, and Madden present. Kelley told the respondent that the victim was dead and that the respondent was under arrest. Kelley again gave the respondent his *Miranda* warnings, and the respondent acknowledged each part of the warnings by saying "yes" or "right." The respondent admitted that he knew the victim and had spoken with her on the preceding Tuesday.

Kelley then informed the respondent that the sneaker had tested positively for blood. The respondent again spoke of his fight with Quish, but Kelley told him that the stains were fresh.

Kelley then informed respondent that two witnesses had seen him on the steps of the church the previous evening and that both witnesses knew the respondent. Kelley referred to the witnesses several times in the course of his interrogation and told the respondent that the police had a good case. The respondent admitted that he and the victim had been together on the church stairs the night before, but said they parted soon afterward. The respondent also said that he was high and had taken 15 Valium pills and had drunk a "few six-packs" of beer.

The respondent then asked what effect on the case his confessing would have. Kelley told the respondent that if he confessed, he could make no promises, and could only let the court know that the respondent had cooperated. Kelley indicated that, when a defendant told the truth, "the court looks upon [such] cases . . . a lot better than when we have to prove it the hard way." He also added that he thought the truth would make a good defense in the respondent's case. Kelley then

described extenuating factors to the respondent, i.e., his intoxication, and also queried if the victim had provoked him. Continuing his questioning, Kelley asked about the circumstances of the previous evening. The respondent answered questions which indicated that he and the victim had gone to 40 Oak Street together, that the victim had refused to have sexual intercourse with him, that he became enraged and kicked her in the face and head several times, knocking her unconscious, that he left, found a large rock, and returned and threw it on the unconscious victim. After the confession, the respondent asked if he had been "railroaded" into a conviction and Kelley assured him no.

That afternoon, based on the confession and the statements of the witnesses Claire Wilde and John Carroll, Officer Solari applied for a warrant to search the respondent's house for the dungarees he had been wearing. The dungarees and a pair of undershorts were recovered in the search.

At approximately 3:45 P.M. that afternoon, after being informed of the respondent's situation, the respondent's mother and brother arrived at the police station. They were told that the respondent had already confessed and were escorted to his cell. Officer Feeney testified that when the respondent saw them he began to cry and said, "Ma, I didn't mean to hit her so hard." The respondent and his mother said that the respondent merely said, "I'm sorry, Ma." The mother and brother then advised the respondent to say nothing to the police.

The police officers testified that at all times, from when the respondent was first spoken to on the street, he appeared steady on his feet, his eyes were clear, his speech was not slurred, and he responded to conversations and questions coherently.

At the pretrial hearing, the respondent filed a motion to suppress his confession. Attached to the motion was the respondent's affidavit alleging that on June 10, 1976, at approx-

imately 9 P.M. he ingested approximately 20 Valium tablets; that on June 11, 1976, at approximately 8:30 A.M. he ingested three or four additional Valium tablets; and that on June 10, 1976, between 6 P.M. and 11 P.M. he drank approximately 12 beers. He further alleged that he did not remember all the questions asked or the answers given during his interrogation.

The respondent testified that during Thursday, June 10, 1976, he intermittently consumed various quantities of beer and marijuana. He also testified that he purchased 20 Valium tablets, and swallowed a handful. He further testified that the next morning he swallowed the rest of the Valium, about four; that he had used heroin since the age of fourteen and had also used Valium in excessive quantities when heroin was not available, and that he had also drunk beer and smoked marijuana. The respondent alleged that he did not remember kicking Miss Birks in the head five to ten times or telling the police that he had.

Dr. Greenblatt, the defense's expert witness, testified that the observable effects of an excessive dose of Valium are difficulty in walking, slurring of speech, and impairment of memory, judgment and intellectual function. Dr. Greenblatt also testified that by 11:30 A.M., twelve, thirteen, or fourteen hours after ingestion, the effects of Valium cannot be stated with certainty because they wear off. He further testified that it is impossible to predict for any individual how profound the effects of Valium will be, and impossible to predict how much residual effect there would be from drugs ingested a previous night. On cross-examination, Dr. Greenblatt testified that tolerance of the drug develops after chronic and habitual use. He further testified that the effect of tolerance is to reduce the intensity and duration of the effects of the drug upon the user.

The Commonwealth's expert witness, Dr. Robert Sovner, agreed with Dr. Greenblatt both as to the effects of Valium and as to the development of tolerance to the effects after

prolonged habitual use. He added that Valium is primarily used in psychiatry to alleviate symptoms of anxiety. He also testified that the peak effects of the largest doses of Valium are reached within two hours after ingestion. After listening to the tape of the respondent's confession, Dr. Sovner concluded that the respondent was, at the time of his statement, alert, oriented and self-possessed.

Reasons for Granting the Writ.

I. The Decision of the Supreme Judicial Court Satisfies The Finality Requirement of 28 U.S.C. § 1257(3).

Under Massachusetts law,[1] an interlocutory appeal from an order of the Superior Court determining a motion to suppress may be taken by either the Commonwealth or the defendant. In the instant case, both parties sought relief from the order of the Superior Court and the matter was decided by the Full Bench. The decision of the court, while not technically satisfying the "final judgment" rule, does fall within the limited category of cases in which this Court has found the requisite finality for the purposes of § 1257(3), even though additional proceedings on the merits were anticipated in the lower court. It is suggested that the decision of the court below holding that a confession, a subsequent admission and certain physical evidence seized pursuant to a warrant must be suppressed at trial because violative of the Fifth Amendment creates a situation which falls within that category of cases outlined in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

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[1] Mass. Gen. Laws, c. 278, § 28E (App. A).

In the instant case, the decision of the Full Bench is final and conclusive, regardless of the outcome of the trial, if such trial is possible given the current ruling. This is the situation addressed in *Cox*:

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481.

California v. *Stewart*, 384 U.S. 436 (1966), epitomizes this category. In taking jurisdiction, the Court stated:

> "After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903." 384 U.S. at 498 n.71.

The Commonwealth would be similarly precluded from appeal should the respondent be tried and acquitted. In addition, the decision of the Supreme Judicial Court carries with it a greater degree of finality than did the decision of the California court in *Stewart*, which had not finally excluded the challenged confession, but had "left the State free to show proof of a waiver." *Miranda* v. *Arizona*, 384 U.S. 436, 525 (1966) (Harlan, J., dissenting). No such further litigation of the issue is left to the Commonwealth in the instant case.

Moreover, a pretrial order suppressing evidence which has been reviewed and conclusively decided by the highest court of the state falls within, it is suggested, the so-called "collateral order" exception to the final judgment rule enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[2] In *Cohen*, the Court recognized that there are some judgments which fall into

> "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. See also *National Socialist Party* v. *Skokie*, 432 U.S. 43 (1977).

In the instant case, the ultimate issue to be determined is the guilt or innocence of the accused. The issue sought to be reviewed here (and only capable of review here and now) is whether certain evidence must be excluded from the trial of the ultimate issue.

Therefore, the Commonwealth urges this Court to apply to the instant case the pragmatic approach to the finality require-

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[2]The reasoning of *Cohen* has been applied to criminal cases. *Stack* v. *Boyle*, 342 U.S. 1 (1951).

ment applied in *California* v. *Stewart*, and to grant review of the federal issue presented herein — an issue which will not survive the remand ordered by the Supreme Judicial Court, whatever the result of the further proceedings.

II. The Supreme Judicial Court has Applied Incorrect Standards of Constitutional Law in Determining the Voluntariness of a Confession.

The Commonwealth suggests that this Court should review the voluntariness of the confession[3] because the court below has imposed upon the prosecution, as a matter of federal constitutional law, greater restrictions on the questioning of suspects than is required by either the Fifth Amendment or this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This the state court may not do. *Oregon* v. *Hass*, 420 U.S. 714 (1975).

Moreover, the court below, while correctly examining the "totality of the circumstances" in reaching a determination as to voluntariness, based its finding of involuntariness solely on the presence of factors which are not in themselves coercive. The court concluded:

> "To conclude: The defendant, eighteen years of age, with a poor educational background, uninformed of his right to reach his family or friends, his judgment impaired through intoxication, confessed after being told that the case against him was established and after receiving assurance that the confession would assist his defense." Mass. Adv. Sh. (1979) 710, 727. (App. B, 18a.)

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[3] It is open to this Court, as a matter of federal constitutional law, to apply constitutional principles to the facts as found by the state court. *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977).

However, such factors are not in themselves coercive, but are "relevant only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect. See *Darwin* v. *Connecticut*, 391 U.S. 346; *Greenwald* v. *Wisconsin*, 390 U.S. 519; *Davis* v. *North Carolina*, *supra*." *Procunier* v. *Atchley*, 400 U.S. 446, 453-454 (1971). Indeed, these factors, on analysis, would add little weight to evidence of actual coercion, were there such evidence. The respondent was not a juvenile. While he had a poor educational background, he had graduated from the ninth grade and had attended two years of high school. While he was not specifically informed of his right to use a telephone, he was twice given his full warnings as required by *Miranda* and responded that he understood. That the respondent voluntarily ingested alcohol and Valium the night before he made the statements in question and took a small amount of Valium several hours before the interrogation, while relevant, does not automatically invalidate a waiver (*Commonwealth* v. *Hooks*, Mass. , Mass. Adv. Sh. (1978) 1356, 376 N.E. 2d 857), let alone automatically render a statement involuntary. Moreover, apart from testimony in answer to a hypothetical question that some impairment in judgment and intellectual function might result from the drugs and alcohol ingested by the respondent, there is nothing, except the respondent's self-serving testimony, to indicate that he was to any material extent incapacitated. Cf. *Townsend* v. *Sain*, 372 U.S. 293 (1963). Moreover, to hold that the respondent's previous ingestion of drugs rendered his statement involuntary is inconsistent with the findings that the respondent *voluntarily* accompanied the police to the station and *voluntarily* gave them the sneaker.

The condition of the respondent and the circumstances of his interrogation do not begin to approximate the circumstances which have been held to require a finding of involun-

tariness. Cf. *Culombe* v. *Connecticut*, 367 U.S. 568 (1961) (defendant mentally defective); *Fikes* v. *Alabama*, 352 U.S. 191 (1957) (defendant a highly suggestible schizophrenic); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960) (defendant, insane and incompetent, confessed after 8-9 hours of incommunicado interrogation); *Davis* v. *North Carolina*, 384 U.S. 737 (1966) (defendant in custody for 16 days, interrogated daily).

Moreover, neither misrepresentation by the police as to the number of identifying witnesses nor the admonition to tell the truth renders a statement involuntary. *Frazier* v. *Cupp*, 394 U.S. 731 (1969); *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *United States* v. *Barfield*, 507 F. 2d 53 (5th Cir. 1975), cert. den. 421 U.S. 950 (1975); *United States* v. *Glasgow*, 451 F. 2d 557 (9th Cir. 1971).

Therefore, the Commonwealth submits that the court below did not apply the correct constitutional criteria in reviewing the issue. The Commonwealth submits that as a matter of constitutional law a finding that the will of a defendant "has been overborne" may not be maintained in the absence of evidence of actual coercion; such a finding cannot be made merely by adding together factors which are not in themselves coercive. To do so impermissibly distorts the Fifth Amendment prohibition against compelled testimony and renders it on a par with the knowing and intelligent waiver requirement of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Such an equation ignores the distinction drawn by this Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

Moreover, the lower court, in reaching its decision to suppress the confession, erred in requiring that the police do more than advise a defendant of his rights under *Miranda* and receive an acknowledgement and an expression of understanding from the defendant (see *Memorandum of Decision*, App. C). This approach is contrary to this Court's decision in *North Carolina* v. *Butler*, No. 78-354, U.S. , 25 Cr. L. 3035

(April 25, 1978), wherein the Court eschewed the inflexible and per se application of the exclusionary rule. It is submitted that the court below has greatly expanded on the mandates of the Constitution in reaching its decision.

III. There is No Per Se Rule Requiring Suppression of Real Evidence Seized Pursuant to a Search Warrant Based upon Statements which are Subsequently Required to be Suppressed.

A. *This Court has Never Applied the "Fruits of the Poisonous Tree" Doctrine to Fifth Amendment Violations.*

The Commonwealth recognizes that the Court has stated that, in a proper case, the rationale of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), might be applicable to Fifth Amendment violations as well as Fourth Amendment violations. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974). However, the Commonwealth suggests that where, as here, the violation is neither flagrant nor resulting from actual coercion, the case is not a proper one for such application.

Indeed, there is conflict among lower state and federal courts as to what type of violation may trigger the doctrine. See *United States* v. *Lemon*, 550 F. 2d 467 (9th Cir. 1977); *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976); *In re Appeal No. 245*, 29 Md. App. 131 (1975); *Rhodes* v. *State*, 91 Nev. 17 (1975).

Moreover, a requirement of actual coercion or intentional bad faith, as apart from skillful interrogation, is consistent with the purpose of the exclusionary rule for, as the Court has stated,

> "'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.' *Elkins* v. *United States*, 364 U.S. 206, 217 (1960)." *United States* v. *Calandra*, 414 U.S. 338, 347 (1974).

It follows that, in order to effectuate this purpose, some intentional bad faith conduct must be involved for sanctions in this case to have future effect.

Moreover, the court below ignored the distinction between the Fifth Amendment bar as to compelled "testimony" and "real" evidence obtained through compulsion. *Keister* v. *Cox*, 307 F. Supp. 1173, 1176 (W.D. Va. 1969). See also *Schmerber* v. *California*, 384 U.S. 757 (1966).

The Commonwealth submits that the application of the *Wong Sun* doctrine by the Supreme Judicial Court violates the rationale of *Michigan* v. *Tucker*, *supra*, and has the effect of requiring that police officers conducting good faith skillful investigations make no mistakes at all.

Therefore, the Commonwealth submits that an issue of vital importance to law enforcement in general has been raised which is worthy of and ripe for decision by this Court.

B. *A Statement Obtained in Violation of Miranda v. Arizona, 384 U.S. 436 (1966), Need Not Be Excluded from All Proceedings.*

Assuming *arguendo* that the confession was elicited in the absence of a knowing and intelligent waiver of the right to remain silent (and the Commonwealth submits that this is the most drastic conclusion which could be supported by the evidence), per se application of the exclusionary rule is at odds with rulings of this Court.

In *Harris* v. *New York*, 401 U.S. 222 (1971), this Court held that a statement of an accused taken in violation of *Miranda* could be used to impeach the direct testimony of the accused at trial. The Court stated:

> "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

Again, in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this Court held admissible at trial the testimony of a witness whom the police discovered as a result of the defendant's statement which had been taken in violation of *Miranda*. See also *United States* v. *Janis*, 428 U.S. 433 (1976).

The Commonwealth submits that *Michigan* v. *Tucker*, *supra*, controls the instant case. The only significant difference involves the type of evidence to be offered at trial. In the instant case, real evidence was seized. Factors which strengthen the argument for admission here are that the real evidence carries with it greater indicia of trustworthiness than the oral testimony held admissible under *Michigan* v. *Tucker*, 417 U.S. 433 (1974), *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring), and that it was seized pursuant to an otherwise valid warrant.

Evidence, although inadmissible at trial, has traditionally been an appropriate basis for determining probable cause for a search warrant. *Spinelli* v. *United States*, 393 U.S. 410 (1969) (hearsay). The fact that the statements were later held to be inadmissible at trial (the only sanction specifically required by *Miranda* or by the Fifth Amendment) should not render them impermissible for a determination that probable cause exists

for the issuance of a search warrant. It would be particularly inappropriate to do so where, as here, the search warrant was applied for in good faith.

Applying the balancing test of *United States* v. *Janis*, 428 U.S. 433 (1976), and *Michigan* v. *Tucker*, 417 U.S. 433 (1974), compels a result contrary to that reached by the Supreme Judicial Court. The Commonwealth suggests that, in the instant case, the interest of the public in having a defendant's guilt or innocence determined on the basis of trustworthy evidence outweighs the need to deter improper police misconduct.

Where there has been no flagrant violation of either the Fifth Amendment or the prophylactics of *Miranda*, to require a blanket application of the exclusionary rule is, the Commonwealth suggests, overkill and is not compelled by federal standards.

"I tend generally to share the view that the per se application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other." *Brewer* v. *Williams*, 430 U.S. 387, 413-414 n.2 (1977) (concurring opinion of Mr. Justice Powell).

Application of the exclusionary rule is even less appropriate in the case at hand, where police officers possessed sufficient information, in addition to the confession, to obtain a search warrant. At the time of application for the warrant, the police had been informed that the respondent and the victim were seen together, that the respondent had offered contradictory explanations on the stains on his sneakers, that the sneakers were stained with blood, and that a person fitting his description had been seen leaving the scene of the murder just after the screams of a woman had been heard. Indeed, the Supreme Judicial Court conceded that the police probably had sufficient evidence to justify the issuing of the warrant.

The Commonwealth recognizes that the Fifth Amendment is implicated in the instant case, but suggests that a contrary approach is not mandated. This case simply does not involve any conduct on the part of the police which has been or could have been deemed to constitute an intentional attempt to deny the respondent his constitutional rights. Compare *Brewer* v. *Williams*, *supra*.

Therefore, the Commonwealth submits that the deterrent purpose of the exclusionary rule would have little effect in this case, for there was no intention to violate any rights of the respondent, and the Commonwealth possessed evidence obtained independently of the illegally obtained confession.

IV. The "Cat out of the Bag" Theory does Not Require Suppression of All Statements Made Subsequent to an Involuntary Confession.

It should be noted that the respondent's statement to his mother, some four hours after his confession, to the effect: "Ma, I didn't mean to hit her so hard," or "Ma, I'm sorry," was made spontaneously, was an expression of regret, was not

elicited by any interrogation, and was not directed to the police.

This Court has never held that an inadmissible confession automatically precludes use of all later voluntary statements. *United States* v. *Bayer*, 331 U.S. 532 (1947). The "cat out of the bag" analysis requires suppression only if, after a prior coerced statement, the defendant is motivated by the belief that any effort to withhold information would be futile and that no harm can be done by repetition or amplification of his earlier statements. *Darwin* v. *Connecticut*, 391 U.S. 346 (1968). The circumstances surrounding the statement in issue clearly do not meet this standard: there was no attempt to obtain information and the statement was not repetitious of the prior confession; rather, it was a spontaneous expression of regret to a family member.

Copeland v. *United States*, 343 F. 2d 287 (D.C. Cir. 1965), provides the correct two-prong analysis. To exclude the statement it must, first, be demonstrated that it would not have been made "but for" the interrogation. Here, the respondent was placed under arrest prior to the interrogation, it is reasonable to suggest that his relatives would arrive at the police station at some point, and it is sheer speculation to assume that the respondent would not have made his spontaneous expression of regret to his mother, absent his prior confession. As the Court stated in *Copeland*, at 291:

> "Whatever the force to the 'cat-out-of-the-bag' argument in determining a nexus between two successive confessions to police, it would seem to have none as to a spontaneous, unsolicited and unexpected comment addressed only to a victim. An apology to a private citizen is a different breed of 'cat' from the kind involved in a statement to police."

Moreover, the second prong to the test is similarly missing, i.e., that the statement is a "fruit" of deliberate exploitation by police of the prior interrogation. The police in the instant situation did nothing to prompt the respondent's expression of regret to his mother.

The Commonwealth suggests that the Supreme Judicial Court has applied the exclusionary rule in a manner far beyond that which is constitutionally required or contemplated by the rulings of this Court.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

Massachusetts General Laws, Chapter 278.

§ 28E. [Appeals by Commonwealth or Defendant of Questions of Law in Criminal Cases Prior to Trial, etc.]

An appeal may be taken by and on behalf of the commonwealth by the attorney general or a district attorney from the superior court to the supreme judicial court in all felony cases from a decision, order or judgment of the court (1) allowing a motion to dismiss an indictment or complaint, or (2) allowing a motion to grant appropriate relief under the provisions of section forty-seven A of chapter two hundred and seventy-seven. On application for an appeal in a felony case by and on behalf of the commonwealth by the attorney general or a district attorney, or by the defendant, a single justice or the chief justice of the supreme judicial court may, upon determining that the administration of justice would be facilitated thereby, grant an interlocutory appeal from a decision, order or judgment of the superior court determining a motion to suppress evidence prior to trial and a single justice shall hear the same or shall report the same to the full court or to the appeals court for hearing; provided, that if such application is denied, or if such application is granted but the interlocutory appeal is heard by a single justice, the determination of the motion to suppress evidence shall be open to review by the full court after trial in the same manner and to the same extent as determinations of such motions not appealed under the interlocutory procedure herein authorized. An appeal shall be taken or an application for appeal shall be filed under this section within ten days after such order, decision or judgment has been entered, and in any case before the defendant has been placed in jeopardy under established rules of law. The appeal, or application and appeal if granted, shall be diligently prosecuted,

and trial shall be stayed pending prosecution and determination thereof.

If the appeal or application therefor is taken on behalf of the commonwealth the defendant shall be released on personal recognizance, and shall be reimbursed his costs of appeal together with reasonable attorneys' fees, subject to the approval of the court.

Rules of practice and procedure with respect to appeals authorized by this section shall be the same as those now applicable to criminal appeals under sections thirty-three A through thirty-three G, inclusive.

Appendix B.

SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* JOSEPH MEEHAN.

Suffolk. December 5, 1978. — March 19, 1979.

Present: HENNESSEY, C.J., BRAUCHER, KAPLAN, LIACOS, & ABRAMS, JJ.

Constitutional Law, Admissions and confessions, Search and seizure, Waiver of constitutional rights. *Search and Seizure. Arrest. Waiver.*

Indictment found and returned in the Superior Court on August 11, 1976.

A motion to suppress evidence was heard by *Good*, J. Applications by the defendant and the Commonwealth for an interlocutory appeal were allowed by *Liacos*, J., and the appeal was reported by him.

Sandra Hamlin, Assistant District Attorney (*Paul A. Mishkin*, Special Assistant District Attorney, with her) for the Commonwealth.

Davis A. Mills (*Walter J. Hurley* with him) for the defendant.

KAPLAN, J. A Suffolk County grand jury handed down an indictment on August 11, 1976, charging the defendant Joseph Meehan with the murder of Maryann Birks. The defendant moved before trial to suppress inculpatory statements made by him as well as articles of clothing belonging to him. Extensive evidence was received on voir dire, including testimony from the defendant and medical testimony dealing with the extent to which the defendant's perceptive ability was impaired when he made the statements. The judge filed lengthy findings which grounded his order granting the motion in part and denying it in part. Thereupon the Commonwealth applied under G.L. c. 278, § 28E, for leave to take an interlocutory

appeal from so much of the order as granted suppression, and the defendant made a similar application with respect to the denial. A single justice of this court granted both applications, and we are thus required to review the several parts of the order. The order will be affirmed except for one feature which in our view merits reversal.[1]

Drawing on the findings and the underlying record, we state some of the facts at this point, reserving the rest for the later discussion of particular issues.

About 6 A.M., Friday, June 11, 1976, police officers found the victim's body on the front law of 40 Oak Street in the Hyde Park neighborhood. The face and head were covered with blood; a large rock found near the body was spotted with blood. Promptly the police attempted to interview individuals living near 40 Oak Street, or known to have been at the nearby Cleary Square (evidently a familiar gathering place) on the previous night.

Of the former group, Mary Crowley, interviewed at her home on 38 Oak Street, said that about 2 A.M. that morning she was awakened by a scream, dogs barking, and a tapping sound; she heard a woman scream, "Don't. Please don't," and then a wordless scream. Crowley's daughter, Claire Wilde, staying at the same address, gave a similar account and added that, looking out the window, she saw a white male walk by the house; he was about five feet ten inches, in his mid-twenties, had dark hair, and was slender; he was wearing faded jeans and his shirtsleeves were rolled up. Some minutes later the man returned and she heard what she described as the sound of a large boulder being thrown on the lawn. She

[1] The defendant has not briefed or argued certain assignments of error and they are considered waived. S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1974). See *Commonwealth* v. *Watkins*, Mass. , & n.2 (1978) (Mass. Adv. Sh. [1978] 1646, 1647, & n.2), and cases cited; Mass. R. A. P. 16, as amended, 367 Mass. 921 (1975).

did not see the man's face. The statements of these two witnesses were recorded on tape.

Also on the morning of June 11, four persons of the Cleary Square group were interviewed at District 5 police station on Hyde Park Avenue. Two gave material statements, also tape-recorded. Joseph Ventola, who knew the victim, said that around midnight he had driven past her; she was on the steps of Christ Church at 1220 River Street in the company of a white man, shirtless, in his late teens, "skinny," with dark hair. The second witness, John Carroll, said that between 11:30 P.M. and midnight he had driven by the victim and the defendant Joseph Meehan (both known to him); they were sitting on the steps of Christ Church; he described Meehan as eighteen or nineteen years old, five feet six, about 130 pounds, dark hair, wearing sneakers and a print shirt with rolled-up sleeves.

As Carroll was being interviewed about 10:30 A.M. in a first-floor room at the police station, he chanced, looking through the window near street level, to see the defendant trying to hitch a ride on Hyde Park Avenue and pointed him out to the police. Detective James Solari, one of the officers present, passed through the opened window to the street, while two other officers, William Cannon and Louis Russo, went by the front door. Russo walked up the street; Solari and Cannon proceeded in a police cruiser. The cruiser pulled up alongside the defendant. Cannon told him they were investigating an assault on a woman, were questioning those who had been seen in the area of the crime, and had been told that the defendant was there the previous evening. They asked the defendant to come with them to the station for an interview. The defendant said he was willing, but he was going to the unemployment office and did not want to be late. The officers answered they would drive him to the office if he should be delayed. The defendant opened the car door and took a rear

seat, where he was joined by the officer who had approached on foot. The defendant was eighteen, five feet six inches, 135 pounds, dark hair, wearing cut-off dungarees and a blue print shirt with rolled-up sleeves.

Officer Solari interviewed the defendant at the station. Sitting at a short distance from the defendant, Solari noticed reddish stains on the defendant's sneakers. In response to a question, the defendant said they were probably mud. When Solari said they appeared to be blood, the defendant said, if so, the stains were from a fight he had had several days earlier with George Quish. Solari asked whether he could inspect the sneakers. The defendant answered by removing the left sneaker and handing it to Solari. Leaving the defendant in the room, Solari took the sneakers and showed them to Sergeant James Feeney. Feeney agreed there were blood stains. It happened that Quish was being interviewed at the station at the same time. When asked by Sergeant Feeney whether he had been involved in a fight recently, Quish said he had not been. Feeney then instructed Solari to arrest the defendant and give him Miranda warnings, which evidently was done (there was no proof as to the manner of administering the warnings). A chemical test, made promptly, confirmed the visual judgment of blood.

About 11:20 A.M., the defendant was passed on to Sergeant Joseph Kelley (with Officers Feeney, Mark Madden, and Russo also present). Kelley gave the defendant Miranda warnings, and then followed an interrogation, interlarded with cajolings and assurances, which continued for perhaps an hour (almost all recorded on tape). Starting with his denial that he had been in the company of the victim on the night of the assault, the defendant was gradually brought around to admitting that he had kicked her, thrown a rock at her, and left her unconscious (as he thought) at the place where she was found. The circumstances of this confession were dealt with

by the judge in particular detail, and must be closely examined later in this opinion.

Mentioning the confession (and with some reference also to the statements of Claire Wilde and John Carroll previously given to the police), Officer Solari applied early that afternoon to the assistant clerk of the Municipal Court of the West Roxbury District for a warrant to search the defendant's house at 1559 River Street and recover the dungarees he was wearing (as mentioned during the confession) at the time of the alleged assault. The dungarees were in fact recovered under the warrant, as was a pair of undershorts found during the search.

The defendant's mother and brother, with Sergeant Feeney present, visited him at his cell at the District 5 station around 3:45 P.M. According to Feeney's testimony (which differed from that of the relatives), the defendant then uttered an incriminatory remark.

The judge after voir dire held (1) there was not an arrest on Hyde Park Avenue; (2) the sneakers should not be suppressed; (3) the confession should be suppressed, (4) with like consequence for the dungarees and undershorts; and (5) the statement to the mother and brother should not be suppressed. The cross-applications for interlocutory appeal followed.

In reviewing the judge's order we apply the standard recently stated, "that there is a presumption against waiver of constitutional rights, and, with regard to the attitude owed by the reviewing court to the trial judge who rules on a motion to suppress, that it is for that judge to resolve questions of credibility; that his subsidiary findings are to be respected if supported by the evidence; that his findings of ultimate fact deriving from the subsidiary findings are open to reexamination by this court, as are his conclusions of law, but, even so, that his conclusion as to waiver is entitled to substantial deference." *Commonwealth* v. *Doyle*, Mass. , n.6 (1970) [Mass. Adv. Sh. (1979) 168, 175 n.6]. Adhering to that

standard, we see no sufficient basis for interfering with the findings or conclusions of the judge below, except as to the statement to the mother and brother which, as matter of law, must be suppressed as the product of the original confession. We reverse that part of the order and affirm the rest.

1. *The arrest.* The defendant argues initially that he was arrested at 10:30 A.M. on Hyde Park Avenue, and that there was not probable cause for an arrest at that time. If the arrest was thus illegal, he maintains, it would infect the sequelae. The Commonwealth contends, and the judge found, that there was no arrest on Hyde Park Avenue, that an arrest did not take place until about 11:15 A.M., after the sneakers appeared on inspection to be bloodied and Quish had denied the fighting. The defendant does not challenge the judge's finding that there was sufficient cause for an arrest at that time.

The judge's conclusion that the defendant accompanied the officers voluntarily, and not under constraint, is well supported. It was put to the defendant that the police were engaged in a general inquiry and were seeking cooperation: the officers asked, did not demand, that the defendant come with them; the defendant opened the car door himself and entered the vehicle without compulsion;[2] the officers yielded to his convenience by promising to drive him to his destination if he lost time. Allowing for any implications arising from the police uniform itself, we think the case for the judge's inference of nonarrest is quite as strong as it was in such instances as *Commonwealth* v. *Cruz*, Mass. (1977) [Mass. Adv. Sh. (1977) 2395], and *Commonwealth* v. *Slaney*, 350 Mass. 400 (1966), where like conclusions were reached. The situation would have been clearer if the officers had told the defendant

[2]The defendant testified that Officer Russo "had his arm on my elbow, opened the door, put me in," but the judge accepted Officer Solari's testimony that the defendant opened the door and climbed into the car himself. Officer Solari also testified that there was no physical contact between the defendant and any of the officers.

that he was free to go on his way if he chose; but this punctilio cannot be insisted on here. See *Commonwealth* v. *Cruz*, *supra* at n.3 [Mass. Adv. Sh. (1977) at 2401 n.3].

The judge seemed to be appraising the defendant's own understanding of his situation (account being taken of the defendant's mental or psychological condition at the time),[3] but we need to add that, regardless of the defendant's inner reaction, there was no arrest for the present purpose if a reasonable person on the scene would not receive the impression that the defendant was being forcibly detained — unless, indeed, the officers had reason to understand that the defendant apprehended he was confronting force, and they then did nothing to disabuse his mind. See *United States* v. *Scheiblauer*, 472 F.2d 297, 301 (9th Cir. 1973); *Seals* v. *United States*, 325 F.2d 1006 (D.C. Cir. 1963). On this view, it also appears there was not an arrest. See *United States* v. *Chaffen*, 587 F.2d 920 (8th Cir. 1978); *United States* v. *Brunson*, 549 F.2d 348 (5th Cir.), cert. denied, 434 U.S. 842 (1977). We need not enter on a more refined subjective-objective analysis. See *State* v. *Kelly*, 376 A.2d 840 (Me. 1977); Model Code of Pre-Arraignment Procedure, Commentary to § 110.1 (1975); Cook, Subjective Attitudes of Arrestee and Arrestor as Affecting Occurrence of Arrest, 19 U. Kan. L. Rev. 173 (1971).

2. *The sneakers.* The judge ruled against suppression of the sneakers on the ground that the defendant surrendered them voluntarily to the officer. In a camera's eye, that is what happened. But the defense disputes a conclusion of consent. It presses a Fourth Amendment contention that, even if not in custody, the defendant was now in a coercive setting, with a tendentious question raised and unresolved — whether the

[3]There is no inconsistency between the judge's finding of voluntariness here and his finding, discussed below, that the defendant's condition of mind was one factor which, together with others arising later, rendered his confession involuntary.

stains were not in fact blood. See *Commonwealth* v. *Harmond*, Mass. , (1978) [Mass. Adv. Sh. (1978) 2773, 2779]. The defendant was not informed that he could withhold the sneakers. See *id.*; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973). Again there is the element of the defendant's mental condition at the time.

The judge's finding of voluntariness is supported, and his ruling should not be disturbed. However, another basis for the ruling is at hand. On a conventional interpretation, the articles were in "plain view," and so could have been taken in any event. For the officer, lawfully questioning the defendant, had a "legitimate reason for being present" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971); the evidence, an article appearing to be bloodstained, was "come by 'inadvertently'" or "without particular design" (*Commonwealth* v. *Bond*, Mass. , [1978]) [Mass. Adv. Sh. (1978) 1241, 1246]; and the officer could recognize it, in combination with the statements received, "to be plausibly related as proof to criminal activity of which [he was] already aware." *Id.* at [Mass. Adv. Sh. (1978) at 1247]. See *Commonwealth* v. *Moynihan*, Mass. (1978) [Mass. Adv. Sh. (1978) 2654]; *Harris* v. *United States*, 390 U.S. 234 (1968). This interpretation is in accord with decisions applying the plain view rule to the seizure without warrant of clothing or other material believed to be bloodstained and thus connected with a crime under investigation. See, e.g., *Commonwealth* v. *Perez*, 357 Mass. 290 (1970); *Smith* v. *Slayton*, 484 F.2d 1188 (4th Cir. 1973), cert. denied, 415 U.S. 924 (1974); *United States* v. *Sheard*, 473 F.2d 139 (D.C. Cir. 1972), cert. denied, 412 U.S. 943 (1973); *State* v. *Hardin*, 518 P.2d 151 (Nev. 1974); *State* v. *Rudd*, 49 N.J. 310 (1967). The case of *McCorquodale* v. *State*, 233 Ga. 369, 375 (1974), cert. denied, 428 U.S. 910 (1976), parallels our facts very closely. Professor LaFave might dispute whether, in strictness, the articles here, having not been come by in the course of a lawful search, were within

the sense of the "plain view" doctrine (W.R. LaFave, Search and Seizure § 2.2 at 240-248 [1978]), but the whole going situation was one where a requirement of procuring a warrant for the sneakers would seem extravagant. Cf. *Cupp* v. *Murphy*, 412 U.S. 291 (1973).

3. *The confession.* (a) *Content.* Sergeant Kelley started his interrogation by stating that the victim was dead and the defendant was under arrest. The defendant: "I am under arrest?" (And later: "Under arrest for what?") Kelley recited the Miranda warnings, asking the defendant to acknowledge each sentence as it was recited, which the defendant did by saying "yes" or "right." Then followed questions whether the defendant knew the victim. The defendant went as far as to say that he had spoken with her the previous Tuesday, but had not gone out with her.

Sergeant Kelley changed the subject to the sneakers and said they had been tested positively for blood. When the defendant tried again to account for this by referring to a fight with Quish on Tuesday, Kelley said the blood stains were fresh, made within hours, and scouted the defendant's attempted (and weak) explanations of how the stains could appear so although made on Tuesday.

Sergeant Kelley returned to the question of the defendant's acquaintance with the victim, and now said that they had been seen together on the church steps last night by two witnesses (not named): both witnesses, he said, were sure of the identification, reliable, and had known the defendant for several years. Kelley said it was not incumbent on him to show these witnesses to the defendant, but the defendant could confirm with Feeney and Madden that they had talked to the witnesses. (Kelley referred to the two witnesses at least seven times and later added, "we are not holding you here on a little thread of evidence. We have a good case here.") The defendant proceeded to admit he and the victim were together on the church stairs about midnight, but he said they had

parted shortly afterwards. He added that he had been "high" and "whacked out" on "downers" — fifteen Valium pills (on top of a "few 6-packs").

At this point, the interrogation seems to pause and take a turn with Madden reporting a question supposed to have been raised by the defendant: If he, the defendant, told them that he did it, "what bearing would that have on the case and what degree it would be?" Kelley went forward on two lines. On the "bearing" of a confession, he spoke at some length. He indicated a number of times that he could make no promises and would only be in a position to make it known to the court and the attorneys that the defendant had cooperated and finally told the truth, and "the court looks upon these cases, where a guy tells the truth, a lot better than when we have to prove it the hard way." But he went on to say: "If you wish to tell the truth of what happened, then I can say in all fairness it would probably help your defense; in fact, I am sure it would." "As I said before, if there is anything more you want to add to it, and my suggestion is the truth is going to be a good defense in this particular case." The second line Kelley took was to indicate there were extenuating factors: he laid stress on the fact of the defendant's drunken condition and, immediately after speaking of the "good defense," elicited from the defendant a "yes" answer to a leading question about the victim's "provoking" the defendant. The defendant first expressed doubt ("I don't know"), then answered questions, many of them leading, to the effect that he and the victim had gone to the Oak Street location where the victim had refused to have intercourse with him because (as she said) he was too young; that in his drunken state he had lost control and kicked her and found a stone nearby and threw it upon her; but he did have intercourse with her, whether before or after the beating, he could not remember. Finding her unconscious, he fled. After most of the story had been elicited, the defendant asked, "Does that

mean I am railroaded in now, then to be convicted and everything now?" Sergeant Kelley: "No."

(b) *Analysis*. The judge did not base himself on a single factor, but rather on the cumulative effect of several,[4] in finding the confession "involuntary," or — to speak more accurately — in finding that the Commonwealth had not carried the heavy burden of establishing that it was voluntary, see *Commonwealth* v. *Murray*, 359 Mass. 541, 546 (1971); *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966). The factors were: communication of incorrect information about the strength of the Commonwealth's case; assurance that the defense would benefit from a confession; defendant's unstable condition combined with his youth and inexperience; failure to inform the defendant he could telephone his family or friends.

(i) It was true that one witness, John Carroll, gave a statement that he saw the defendant and the victim sitting on the church steps on the fatal night and that he had known and recognized them both. There was, however, no second witness who gave a like statement. Officer Kelley had in fact interviewed both Carroll and Joseph Ventola and had heard Ventola say that he did not recognize the male sitting on the steps. Ventola's description of the male actually contradicted Carroll's statement in the matter of whether the male was wear-

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[4] Referring to the factors of defendant's youth, inexperience, and psychological condition induced by his drug and alcohol intake, the judge doubted seriously the effectiveness of the waiver of Miranda rights, but in his apparent view (which we share) the decision is better rested on those and other factors which in combination rendered the confession involuntary. (As the judge noted, there is a place in the tape of the interrogation which may be open to the interpretation that, at a point before the most serious admissions, Sergeant Kelley went on to question the defendant although the defendant had indicated that that was all he wanted ["liked"] to say. See *Miranda* v. *Arizona*, 384 U.S. 436, 474 [1966]; *Commonwealth* v. *Mitchell*, 246 Pa. Super. Ct. 132, 136 n.3 [1977]. The interpretation is dubious and again we pass to the better foundation of decision.)

ing a shirt. Officer Kelley's statements, repeatedly bracketing two witnesses as having known the defendant for years and as giving direct, mutually reinforcing identifications, were deceptive. The more general remarks about the strength of the Commonwealth's "case" served still further to give the impression that the case against the defendant was already proved. Taken alone, the misinformation would not, we think, suffice to show "involuntariness" (see *Frazier* v. *Cupp*, 394 U.S. 731 [1969]; *United States ex rel. Hall* v. *Director, Dep't of Corrections of Ill.*, 578 F.2d 194 [7th Cir. 1978]), but the judge could view it as a relevant factor in considering whether the defendant's ability to make a free choice was undermined. See *Commonwealth* v. *Jackson*, Mass. , & n.8 (1979) [Mass. Adv. Sh. (1979) 401, 413 & n.8]; *United States ex rel.* ett v. *Murphy*, 329 F.2d 68 (2d Cir.), cert. denied, 377 U.S. 967 (1964); *United States ex rel. Caminito* v. *Murphy*, 222 F.2d 698 (2d Cir. 1955); *Robinson* v. *Smith*, 451 F. Supp. 1278 (W.D.N.Y. 1978); Model Code of Pre-Arraignment Procedure, Commentary to § 140.4 (1975).

(ii) The judge could find that the police overstepped the permissible line in advising the defendant about the consequences a confession might have for the conduct of the defense.

An officer may suggest broadly that it would be "better" for a suspect to tell the truth,[5] may indicate that the person's cooperation would be brought to the attention of the public officials or others involved,[6] or may state in general terms that co-

[5] See *United States* v. *Barfield*, 507 F.2d 53 (5th Cir.), cert. denied, 421 U.S. 950 (1975); *State* v. *McLallen*, 522 S.W.2d 1 (Mo. 1975); *Bell* v. *State*, 258 Ark. 976 (1975); *Robinson* v. *State*, 229 Ga. 14 (1972); *Coursey* v. *State*, 457 S.W.2d 565 (Tex. Crim. App. 1970).

[6] See *United States* v. *Curtis*, 562 F.2d 1153, 1154 (9th Cir. 1977), cert. denied, 99 S. Ct. 279 (1978); *United States* v. *Frazier*, 434 F.2d 994 (5th Cir. 1970); *Fernandez-Delgado* v. *United States*, 368 F.2d 34 (9th Cir. 1966); *Burton* v. *Cox*, 312 F. Supp. 264 (W.D. Va. 1970); *People* v. *Hubbard*, 55 Ill. 2d 142 (1973).

operation has been considered favorably by the courts in the past.[7] What is prohibited, if a confession is to stand, is an assurance, express or implied, that it will aid the defense or result in a lesser sentence.[8]

Here the officer did emphasize that he could make no promises. But having said that, and uttered in addition the generalities about cooperation, he assured the defendant that a confession would "probably help your defense; in fact, I am sure it would." The further remark that "the truth is going to be a good defense in this particular case" goes further and carries an intimation that the defendant would be exonerated. Especially is this thought conveyed, when in the immediate background is the idea that a crime, if it was committed, would be palliated by the victim's "provocation" and by the defendant's inebriated condition at the time.

The law invoked here goes back many years. "No cases require more careful scrutiny," said this court in *Commonwealth* v. *Curtis*, 97 Mass. 574, 578 (1867), "than those of disclosures made by a party under arrest to the officer who has him in custody, and in none will slighter threats or promises of favor exclude the subsequent confessions." In that case the court excluded a confession given after an assurance by a police officer that "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence." For other expressions of the policy, see *Commonwealth* v. *Smith*, 119 Mass. 305 (1876); *Commonwealth* v. *Taylor*, 5 Cush. 605

[7] See *United States* v. *Reynolds*, 532 F.2d 1150 (7th Cir. 1976); *United States* v. *Glasgow*, 451 F.2d 557 (9th Cir. 1971); *Wallace* v. *State*, 290 Ala. 201 (1973).

[8] See *Bram* v. *United States*, 168 U.S. 532 (1897); *Grades* v. *Boles*, 398 F.2d 409 (4th Cir. 1968); *State* v. *Setzer*, 20 Wash. App. 46 (1978); *Bradley* v. *State*, 356 So.2d 849 (Fla. Dist. Ct. App. 1978); *State* v. *William*, 33 N.C. App. 624 (1977); *State* v. *Tardiff*, 374 A.2d 598 (Me. 1977); *Robinson* v. *State*, 229 Ga. 14 (1972); *Wallace* v. *State*, 290 Ala. 201 (1973); *State* v. *Castonguay*, 240 A.2d 747 (Me. 1968); *Lyter* v. *State*, 2 Md. App. 654 (1968); *State* v. *Fuqua*, 269 N.C. 223 (1967).

(1850); *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964); and for cases on either side of the line, compare *Bram* v. *United States*, 168 U.S. 532 (1897), and *State* v. *Pruitt*, 286 N.C. 442, 458 (1975), with *United States* v. *Williams*, 479 F.2d 1138 (4th Cir.), cert. denied, 414 U.S. 1025 (1973), and *United States* v. *Springer*, 460 F.2d 1344 (7th Cir.), cert. denied, 409 U.S. 873 (1972).

(iii) In the defendant's confession and affidavit on the motion to suppress, and his testimony and the testimony of others on voir dire, there was basis for questions to a medical expert called by the defense which led to the following opinion. If a person ingested ninety-five milligrams of Valium between 7:30 and 9 P.M. and between 7:30 and 11:30 P.M. drank twelve twelve-ounce bottles of beer,[9] there would be an impairment of memory, judgment, and intellectual function for at least six hours. At 11:30 the next morning, a wearing-off of the effects of the drug might be expected, "how much can't be said with certainty." If, in addition, twenty-five milligrams were taken at 10:20 A.M. that morning,[10] there would be at 11:20 A.M. "Some drowsiness, sedation, impairment of judgment and intellectual function." The same expert conceded that if a person took Valium once a week over a two-year period, some "tolerance would develop," but there was in fact no testimony that the defendant had been so regular a user. Expert testimony on the part of the Commonwealth was less suggestive of difficulties that the defendant might experience in

[9] In his affidavit the defendant stated that he took twenty five-milligram tablets of Valium at about 9 P.M. on June 10, drank about twelve containers of beer between 6 and 11 P.M. that evening, and about 8:30 A.M. on the following morning ingested an additional three or four Valium tablets. During the voir dire he added that he had smoked an unspecified quantity of marihuana on the evening of June 10.

[10] In fact the defendant said that he ingested Valium at about 8:30 A.M.; but the testimony as to the duration of the effects of the drug indicated that the one hour and fifty-minutes disparity would not make a material difference.

the morning. The defendant testified that he was dazed and confused and unable to remember much of the questioning by the police. Reading and listening to the tape of the Kelley interrogation, one finds strings of questions answered with monosyllables ("not reassuring explanations of his asserted comprehension," *Commonwealth* v. *Daniels*, 366 Mass. 601, 608 [1975]); confusion, too, in the defendant's questions about whether he was under arrest and whether he was to be "railroaded." Other answers were more forthcoming and involved some reasoning. The judge concluded that the defendant's judgment at that time was "dim" and "impaired." If it should be assumed that this condition would not alone justify suppression of the admissions (compare *Commonwealth* v. *White*, Mass. [1977] [Mass. Adv. Sh. (1977) 2805], aff'd by an equally divided court, U.S. [1978] [47 U.S.L.W. 4066 (Dec. 11, 1978)], with *Commonwealth* v. *Doyle*, Mass. [1979] [Mass. Adv. Sh. (1979) 168]), it would still be entitled to count in the judge's total assessment. See *Commonwealth* v. *Johnston*, Mass. (1977) [Mass. Adv. Sh. (1977) 1473]; *United States* v. *Grant*, 427 F. Supp. 45, 50 (S.D.N.Y. 1976).[11] So also the judge could give weight to the defendant's youth, inexperience, and limited schooling. See *Commonwealth* v. *Cain*, 361 Mass. 224, 228-229 (1972).

(iv) Especially in light of the defendant's youth, inexperience, and condition, a violation of G.L. c. 276, § 33A, as amended through St. 1963, c. 212, assumes importance. A person under arrest at a station with a telephone is entitled to be informed "forthwith upon his arrival . . . of his right to so use the telephone [i.e., to communicate with his family or friends], and such use shall be permitted within one hour thereafter." It has been held that unfavorable evidence, obtained as the result of an intentional deprival of the statutory

[11] See note 4 *supra*.

right, should be considered inadmissible and subject to suppression. *Commonwealth* v. *Jones*, 362 Mass. 497 (1972). We have not yet ordered suppression in a case where, although deprivation has occurred, it was not through proved intention; but we have lately again given warning of the importance of the statutory duty. See *Commonwealth* v. *Alicea*, Mass. , n.11 (1978) [Mass. Adv. Sh. (1978) 2707, 2711 n.11]. We agree with the judge that the failure affirmatively to comply with the statute is a factor in deciding whether a confession, vulnerable on other grounds, should be suppressed. Incidentally, it is clear, as will be seen below, that had the defendant called his mother or brother, they would have advised him not to speak to the police.

To conclude: The defendant, eighteen years of age, with a poor educational background, uninformed of his right to reach his family or friends, his judgment impaired through intoxication, confessed after being told that the case against him was established and after receiving assurance that the confession would assit his defense. We should not interfere with the judge's conclusion that the confession was involuntary and inadmissible.

4. *The dungarees.* When Officer Solari presented his application for the search warrant, the police were in possession of evidence probably sufficient, apart from the confession, to justify the issuance. The application, however, omitted mention of the crucial parts of this evidence, and the Commonwealth proceeds here on the assumption that the warrant rests on the confession. So the question is raised whether the warrant can legalize the seizure of the dungarees, when it is held that the confession must be suppressed. We agree that the answer is no, and this is explained simply on the ground that the confession was involuntary and thus directly offensive to the Fifth Amendment. See *United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890, 892-893 (7th Cir. 1976); *United States* v. *Massey*, 437 F. Supp. 843, 861-862 (M.D. Fla. 1977). Cf. *United States* v. *Castellana*, 488 F.2d 65 (5th Cir. 1974); *United States* v. *Cassell*, 452 F.2d 533, 541 (7th Cir. 1971). The conclusion follows from our recent decision of *Commonwealth* v. *White*, *supra* at - [Mass. Adv. Sh. (1977) at 2812-2813], where we suggested that the reasons for excluding the product of a warrant based on an inadmissible confession are surely no less persuasive than those for excluding material seized in pursuance of a warrant supported by an affidavit infected by evidence that has been unlawfully seized. See Model Code of Pre-Arraignment Procedure, Commentary to § 150.4 (1975).

There are cases in the Supreme Court suggesting that in certain circumstances evidence, secured as a result of a confession elicited by a violation of the prophylactic Miranda rule, need not be excluded on any constitutional ground. See *Michigan* v. *Tucker*, 417 U.S. 433 (1974). Cf. *Oregon* v. *Haas*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971) (the latter case was followed in *Commonwealth* v. *Harris*, 364 Mass. 236 [1973]). Those cases do not, however, reach the present, where the confession was involuntary. This distinction has been noted by the Court.[12] We add that our position here is

[12] In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), where the Court held that testimonial evidence need not be excluded because it was obtained as a result of a confession elicited in violation of Miranda, the confession "could hardly be termed involuntary." Thus "the police conduct . . . did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*." *Id.* at 444-445. See also *Oregon* v. *Haas*, 420 U.S. 714, 722 (1975); *Harris* v. *New York*, 401 U.S. 222, 224 (1971). After *Michigan* v. *Tucker*, some courts have expressed doubt as to whether physical evidence gathered as a result of a confession which is voluntary but obtained in violation of Miranda requirements must always be excluded as its "fruits." See *United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890, 894 n.3 (7th Cir. 1976); *Rhodes* v. *State*, 91 Nev. 17, 23 (1975). But see *Commonwealth* v. *Caso*, Mass. (1979) (Mass. Adv. Sh. [1979] 298); *United States* v. *Ceccolini*, 435 U.S. 268 (1978) (suggesting that

consistent with both the majority and minority views expressed in *Commonwealth* v. *Mahnke*, 368 Mass. 662 (1975), cert. denied. 425 U.S. 959 (1976).

5. *The afternoon statement.* News of the defendant's trouble did not reach his mother or brother until mid-afternoon. About 3:45 P.M. they arrived at the police station and were informed that the defendant had already confessed the crime. Sergeant Feeney and at least one other officer escorted the pair to the defendant's cell. Feeney testified that, as his visitors appeared, the defendant blurted out, "Ma, I didn't mean to hit her so hard." According to the defendant and his mother, he said only, "I'm sorry, ma." The mother and brother said loudly the defendant should say nothing to the police. The encounter was extremely emotional; the three were shouting at different points in the conversation.

In contending that any incriminating statement was consequent upon the involuntary confession and therefore similarly inadmissible, the defendant relied on the "cat out of the bag" analysis, which requires "the exclusion of a statement if, in giving the statement, the defendant was motivated by a belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements." *Commonwealth* v. *Mahnke*, *supra* at 686. See *Commonwealth* v. *Watkins*, Mass. , - (1978) [Mass. Adv. Sh. (1978) 1646, 1656-1661]; *United States* v. *Bayer*, 331 U.S. 532, 540 (1947). The judge below pointed to the following circumstances to show that the conditions of the statement were different from those of the confession and the two were thus independent: the statement was not prompted by police interrogation or made to the police (although police officers were within hearing), but was rather made to the family, and it appeared spontaneous.

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derivative physical evidence will less readily be admitted than derivative testimonial evidence).

Here we are obliged to hold that the judge committed error. His conclusion is not supported, and a contrary conclusion plainly is. The error actually derives from a misperception of the law.

It has been suggested that "there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first, and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time." *United States* v. *Gorman*, 355 F.2d 151, 157 (2d Cir. 1965), cert. denied, 384 U.S. 1024 (1966) (Friendly, J.). See *Brown* v. *Illinois*, 422 U.S. 590, 605 & n.12 (1975); *Darwin* v. *Connecticut*, 391 U.S. 346, 350-351 (1968) (Harlan, J., concurring in part and dissenting in part). The factors relied on by the judge were not themselves strong enough to provide "insulation," and in all events they were quite overcome by other circumstances. The statement was made a relatively short time after the confession, and at the same place; it was corroborative of the confession; there was no opportunity for consultation with family; although, as we have noted, there had been a statement that the confession would help the defendant or even free him in the end, we cannot say he had such confidence as would mark a "break in time or the stream of events" (see *Commonwealth* v. *Haas*, Mass. , [1977] [Mass. Adv. Sh. (1977) 2212, 2223]) sufficient to dissociate the statement from the confession. Cf. *Commonwealth* v. *Mahnke*, *supra*, 368 Mass. at 667. Nor do we think it may be assumed that remorse was so far at work as to provide the "break." See *id.* at 688 & n.31; *Copeland* v. *United States*, 343 F.2d 287, 291 & n.3 (D.C. Cir. 1964). Finally, the confession was rendered involuntary by police misconduct which cannot be termed inadvertent. Cf. *Knott* v. *Howard*, 378 F. Supp. 1325 (D.R.I. 1974), aff'd, 511 F.2d 1060 (1st Cir. 1975). The burden was on the Com-

monwealth to show circumstances insulating the statement from the confession, see *Brown* v. *Illinois, supra* at 604, and in this we think it must fail.

Our conclusion is in accord with other decisions requiring the suppression of an inculpatory statement which followed an inadmissible confession and which was not made in the course of police interrogation. See *Ricks* v. *United States*, 334 F.2d 964 (D.C. Cir. 1964); *State* v. *Paz*, 31 Ore. App. 851 (1977). Cf. *Copeland* v. *United States, supra* at 292 (Bazelon, C.J., concurring in part and dissenting in part); *Commonwealth* v. *Bordner*, 432 Pa. 405 (1968); *Soolook* v. *State*, 447 P.2d 55 (Alas. 1968), cert. denied, 396 U.S. 850 (1969).

6. *Conclusion*. The order of the Superior Court is reversed in so far as it denied the defendant's motion to suppress the alleged mid-afternoon inculpatory statement; in all other respects it is affirmed. The case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH OF MASSACHUSETTS

v.

JOSEPH D. MEEHAN

Memorandum of Decision with Reference to Motion to Suppress Evidence.

1. On Friday, June 11, 1976, at about 6:30 A.M., there was found on the front lawn of 40 Oak Street, Hyde Park, the body of the victim, one Mary Ann Burkes, maiden name Mary Ann Foley. The deceased was found lying face-down with her white pants below her buttocks, her personal belongings including a large handbag being strewn on the ground near the body. The victim's head was covered by blood, and after the body was removed from the ground there was blood on the grass. A large rock was found near the body of the deceased and a photograph of this rock with blood on it, as well as the rock itself, were introduced into evidence.

2. The defendant filed a Motion to Suppress to which was appended an affidavit of the defendant Joseph D. Meehan, as well as an affidavit of Walter J. Hurley, Esq., counsel for the defendant. This Motion to Suppress and its appendages are incorporated by reference as part of this Memorandum of Decision.

3. I shall now deal with the specific questions which have been raised by the defendant by means of the Motion to Suppress. (A) *The arrest of the defendant*. I rule that the police had the requisite probable cause to arrest the defendant Joseph Meehan for murder, without a warrant, when the said defendant was at Station 5. I further rule that the defendant Joseph D. Meehan was not arrested while he was walking on Hyde Park Avenue at the time the police drove up to him and asked him to come to the station for questioning.

4. With reference to the above two rulings which I have just made, I make the following findings of fact on which I have based these findings.

5. When the police learned about the existence of this homicide in this case and after the body had been examined at 40 Oak Street, the police proceeded in the direction of initiating immediately an ongoing investigation. At the outset the investigation proceeded in two directions. The first aspect of the investigation was that the police undertook to make an inquiry of the neighbors who resided in the neighborhood of 40 Oak Street, the location at which was found the body of the deceased. Another aspect of this investigation was to undertake to learn who was in the area of Cleary Square on the evening of June 10th and the early morning of June 11th, and upon ascertaining the identity of these individuals to have them come to the station to be interviewed and questioned in order to see if they could assist in the progress of this investigation.

6. With reference to the interviews of the people who lived in the neighborhood of 40 Oak Street, several people were questioned by the police and this group included Clare Wilde, Mary Crowley, Nina Giardini, Eleanor Stella and Jean McCarthy, the daughter of Eleanor Stella. The witness Wilde, at about 2:00 or 2:30 A.M. on the morning of June 11th, was awakened by the sound of a barking dog, got up from bed and

heard a tapping noise. While she was looking out her second-story bedroom window, she saw a white male walk by her house in the direction of the Most Precious Blood Church. She described the white male as probably in his mid-twenties, about five feet ten, medium-slender build and about 150 pounds, having dark hair and wearing faded jeans and what appeared to be a long-sleeved shirt with the sleeves rolled up. She did not see the face of this man as he passed within her view. Three or four minutes later the man returned and she heard what she described as the sound of a large boulder. There was a bush on the lawn of 40 Oak Street which prevented her from seeing the body of the victim.

7. Another witness in the neighborhood was Mary Crowley, the mother of Clare Wilde, who heard a woman scream, "Don't. Please don't." She then heard dogs barking and a tapping noise.

8. At the same time, Officer Feeney was in charge of that aspect of the investigation which was designed to bring to the station young men, known to have been in Cleary Square during the evening of June 10, 1976, and early in the morning of June 11, 1976. The police effort in this direction was designed to get information concerning this crime. A number of young men were brought into the station, to wit: Joseph Ventola, Francis Hughes, John Carroll and Joseph Meehan. Another young man came in on his own initiative because he heard that the police were looking for him; namely, George Quish.

9. Ventola and Carroll came to the police station because the police sought them out, Ventola being at his place of employment and Carroll being at his home at the time the police contacted him. The police informed these two young men that the police were investigating an assault on a woman in Cleary Square on the night before and each one was being asked to accompany the police to the station in order to answer

questions. In addition, one Francis Hughes was also brought to the police station.

10. Ventola knew the victim because he saw her walking her dog near his place of employment, Cooper's Auto Body, Eastern Avenue, Hyde Park. He had seen the victim in the company of a young white male, around midnight, on the evening of June 10, 1976, sitting on the steps of the Christ Church. He described the white male as seventeen or eighteen years of age, "skinny," with blackish-brownish hair that came to about an inch below the ears and the male was wearing no shirt.

11. Carroll came to the police station and was interviewed in the Detectives' Room in the presence of Detective Solari. The Detectives' Room faces the front of the District 5 Police Headquarters on Hyde Park Avenue. Carroll had seen the victim, whom he had known at school, in the company of one Joseph Meehan whom he, Carroll, had known for six or seven years. The victim and Meehan were sitting on the steps of Christ Church between 11:30 P.M. and 12:00 midnight on the evening of June 10, 1976. As this interview was in progress, Carroll looked out the window of the Detectives' Room and remarked that an individual, thumbing a ride outside the police station at that time, was Joseph Meehan. Detective Solari immediately left the District 5 building by way of a window which was about four feet above the level of the sidewalk. Officer Cannon and Detective Russo left the building by the front door and Cannon got into an unmarked police car in front of the station, made a U-turn, and with Detective Solari in the vehicle proceeded up Hyde Park Avenue in the direction of Joseph Meehan. This car was used so that if Meehan were successful in hitching a ride, the officers intended to follow the car. Officer Russo walked up the sidewalk after Joseph Meehan.

12. Officers Solari and Cannon, in the police car, pulled up alongside Joseph Meehan and did not get out of the car, but Officer Cannon talked to the defendant. He told the defendant that the police were investigating an assault on a woman and they were questioning all the young men who were known to have been in the neighborhood the previous evening and they found out that Joseph Meehan had been there and asked him if he would come back to the station to be interveiwed. Meehan answered in the affirmative but indicated that he was on the way to the Unemployment Office in order to take care of an unemployment matter affecting him and Meehan was told that the police would drive him there if he were delayed. The defendant Meehan opened the rear door of the police car and climbed into the back seat, and Officer Russo got into the back seat with him and they all drove back to Station 5. This occurred at about 10:30 A.M.

13. The description of an individual which had been obtained from the persons on O k Street was as follows: He was wearing blue dungarees, a blue shirt with a print on it, was eighteen to nineteen years old, was slim and no mention was made of his height. At the station observations of the defendant indicated that he was wearing cutoff dungarees, a blue shirt with the sleeves rolled up and a print on the shirt.

14. At the District 5 Headquarters, Solari sat down, facing Joseph Meehan, for the purpose of interviewing the defendant. At the same time Detective Cannon pursued his duties in connection with the investigation and then undertook to interview one George Quish who had come to the station because he had heard that the police wanted to talk to him.

15. When Solari sat down facing Meehan, he was about one and a half feet away from Meehan. The defendant sat down and crossed his legs and Detective Solari observed a rust-colored stain on Meehan's sneakers. The officer's experience suggested to him that this might well be blood and he asked

Meehan what was the stain on his sneakers. Meehan responded that it was probably mud from the pond in Dedham where he had been swimming the day before. Solari responded that the stain looked like blood to him and Meehan said that if it were blood, the blood belonged to George Quish because he had a fight with George Quish some time ago. Officer Solari asked Meehan if he could have his sneakers and Meehan took his left sneaker off and handed it to the officer. Immediately thereafter, the sneaker was subjected to chemical examination and tests by the Police Department chemist, one Stanley Bogden, and his tests indicated that the stain was blood. At the same time and inasmuch as Quish was then in the station being interviewed by Officer Cannon, Sergeant Feeney asked Officer Cannon to question Quish as to whether or not he had had a fight with anyone recently. Quish denied that he had had a fight but stated that the cut on his nose was as a result of falling down drunk some night a week before.

16. Thereupon, the defendant Joseph Meehan was placed under arrest.

17. I have recited these fcts at some length in order to demonstrate that in my judgment the police had the requisite probable cause to arrest the defendant Joseph Meehan for murder and to do that without a warrant while at the police station. I find and rule that at the moment of his arrest, the arresting officer had knowledge of facts, based upon reasonably trustworthy information, sufficient to warrant him as a prudent man in believing that Meehan had committed this crime.

18. This recitation of facts also is designed to indicate that I came to the conclusion that when the police drove after Joseph Meehan on Hyde Park Avenue and asked him to come back to the station where the officers were questioning a group of young people who were known to have been in the Cleary Square vicinity on the evening of June 10 and the early morning of June 11, that the defendant voluntarily agreed to come back to the Police Headquarters at District 5 and was subjected to no restraint of any sort. For these reasons, then, I have ruled that the arrest of Joseph Meehan occurred at the District 5 Headquarters as stated above and that that arrest was based upon probable cause and therefore it was not necessary to obtain a warrant for his arrest. And for like reasons I have ruled that the defendant was not arrested in the course of the occurrences recited above on Hyde Park Avenue preceding the defendant's return to the District 5 Headquarters with the police in order to be interviewed. I rule, as well, that the arrest of Joseph Meehan as described above was a legal arrest and on that basis the arguments of the defendant which had been made and based upon the premise of an illegal arrest are no longer discussed by me in that they fail for the reasons stated above. In addition to the above, I rule that the activity which occurred on Hyde Park Avenue on the morning of June 11, 1976, with reference to the police car and the officers and Joseph Meehan were actions taken by the police in connection with an ongoing investigation and that at that time the defendant was asked to come back to District 5 Headquarters with all the other men who were known to have been in that vicinity on the evening of June 10 and the early morning of June 11, 1976. In addition, I find and rule that in any event Joseph Meehan voluntarily agreed to go back with the police to District 5 Headquarters in order to be interviewed with this group of young people which I have just described. I find that the defendant's liberty of movement had not become restricted by the action of the police, nor had he, in effect, submitted to the authority and control of the arresting officers, and for that reason he went with the police to District 5 Headquarters voluntarily.

19. (B) *The sneakers of the defendant*. In view of my rulings above and the facts recited above, I find and rule that the

defendant Meehan voluntarily turned over his sneakers to Detective Solari at the request of the latter. Indeed, I find and rule that the defendant was not in custody by way of arrest at the time the defendant voluntarily gave his sneakers to the detective. The defendant's counsel has theorized as to what would have happened if Meehan had declined or refused to return to Police Headquarters. The facts of this case, as I have found them, make such speculation immaterial and further discussion thereof unnecessary.

20. The fact that the police reacted with speed when Meehan's thumbing a ride on Hyde Park Avenue was brought to the attention of the police officers and the fact that the police cars were in the ready-to-use position, point to an efficient and alert police action, particularly as they were in the initial stages of investigating what appeared to be a brutal homicide which had just been brought to the attention of the police.

21. Of course the ordinary citizen is called upon to assist the police in connection with their investigation of a crime. It is the duty of every citizen to assist the police in that direction and up to the point of self-incrimination. When the police caught up with Meehan on Hyde Park Avenue, he was one of a group of young men who were known to have been in the Cleary Square vicinity on the evening of June 10 and the early morning of June 11, 1976, and who were being brought to District 5 Headquarters to be interviewed and possibly to render assistance with reference to this crime. I find that this was the posture of the defendant Meehan at that time.

22. (C) *The defendant's statement to the police.*

a. Was it voluntary?

b. Was there any violation of the Miranda rule, so-called?

23. I have already ruled that the arrest of the defendant in this case was a legal arrest, made upon probable cause in compliance with the law. Therefore, I do not deal with the de-

fendant's statement on the subject of inculpatory admissions on the basis of an illegal arrest, as has been argued in part by counsel for the defendant.

24. In dealing with these questions, I have considered the affidavit of Meehan as to the amount of Valium tablets he consumed during the evening of June 10 and on the early morning of June 11, 1976, (a total of twenty-four tablets) and he had consumed twelve cans of beer during the late evening of June 10th; I have considered, as well, the medical opinions of Dr. Sovner and Dr. Greenblatt as to the observable effects of the taking of such pills and beer: Such would leave a person with slurred speech, unsteady gait, drowsy and sleepy, and the memory and judgment of such person would be impaired. There was a difference of medical opinion as to when the peak effects of the Valium consumption would be reached and a discussion of the build-up of tolerance in a constant drug user; the manner in which the Miranda warnings, so-called, were given to the defendant Meehan and his responses thereto; the age, educational background and state of maturity of the defendant; and finally the nature and content of the entire transcript of the "questioning" of Meehan by Sergeant Kelly, as contained in Exhibit 14, Pages 29 to 48, inclusive.

25. On the basis of the above, I find and rule as follows:

A. The Commonwealth has not satisfied the burden of proving that the defendant waived his rights *intelligently, voluntarily* and *knowingly*. The defendant's one-word responses to each of the said warnings, indicate to me nothing more than that the Miranda warnings were recited to Meehan and he apparently heard them. I do not consider that this procedure, when it appears to have been done hurriedly and in the form of rote, is all that is required to constitute a waiver of these very vital rights of a defendant. The requirement that a waiver be made *intelligently, voluntarily* and *knowingly,*

requires something more than "Right," "Yes," and/or "I waive." For example, the Judge must be satisfied that such waivers were made "knowingly": It must appear in some way that a defendant knows what each right means with reference to him and the present charges against him; he must do something more than acknowledge the mere reading of each of these constitutional rights and give an affirmative statement such as "Yes" or "Right" to the query that he "understands that" which has been read to him. There is no statement that having understood the reading of his "rights" to him that the police are obligated to respect his insistence on his rights if he asserts his rights. And thereafter to finalize the cutoff from the defendant of his constitutional rights by means of the question: "Are you willing to talk to me about Mary Ann Burkes?" Answer: "Yes," and with the completeness and finality which the government asserts opens up the entire charge of murder and exposes the defendant to the serious and life-long consequences that would follow, is entirely too deadly an application of what is supposed to be a procedure whereby one can defend himself by silence against an almost overpowering set of circumstances. Such a rote reading of the "Miranda card rights" makes what appears to be the ultimate line of protection of an individual involved in the most serious problem of his life almost a mere platitude and the reducing of the giving of the Miranda warnings to a mere ritual. This Court is unable to infer that this eighteen-year-old defendant, with moderate and limited schooling, after riding off a night and morning Valium and beer experience, with a degree of hangover a matter of disagreement between the two doctor experts, with the dimness of his sense of judgment still hanging over him, was even aware of the significance of his rights, much less the significance of his waiver of these rights. And the fact that he knew his name and address, and where he lived, his age and telephone number, is hardly an adequate basis for saying

that the defendant should therefore be held to have intelligently, voluntarily and knowingly waived his priceless rights he enjoys by saying "Yes" to the question, "Are you willing to talk to me about Mary Ann Burkes?" For this question to constitute the key to this waiver is strange, because the wording of this question itself is peculiar. The Miranda warning does not prohibit talking about the victim, but about the crime committed upon the victim. A literal application of the government's standard of interpreting the effect of the defendant's responses of "Right" and "Yes," would suggest that his answer of "Yes" should limit his willingness to talk to Sergeant Kelly about Mary Ann Burkes, but not of the manner in which she met her death nor with reference to the crime of the homicide of the victim, each of which would appear to require a more appropriate and direct question and answer. A shallow interpretation of such rule as the Miranda warning requirement without some evidence that the defendant intelligently, voluntarily and knowingly "waived" these rights, is almost to say that there is no rule at all.

26. In addition, there is no evidence that the defendant was told that he could make a telephone call to his mother or anyone else. And the eighteen-year-old male, coming out of a bout with Valium and not being smart enough to ask for or even think of it, should have been given the opportunity to use the telephone.

27. I think, in addition, that the most telling aspect of the defendant's statement, with its confessions, etc., is a transcript of the questioning of the defendant itself. I make reference to Sergeant Kelly's routine recitation of the constitutional rights to the defendant on Pages 29 and 30; the defendant's one-word answers thereto; on Page 33, the defendant *wanted to see* the witnesses who said he was with the deceased on the church steps the previous night; Page 33 and 34, that there were two

separate witnesses who were stated to know Meehan for several years, that they are positively sure that it was Meehan and that is the reason you are in here; and there follows lines of ominous expressions, then a suggestion to think it over but Meehan was given no time to do so; then telling the defendant he is under arrest and a reference that the defendant had been given his rights, and the defendant's response was "Under arrest for what?"; the defendant asked again to see the witnesses who identified him. Then Sergeant Kelly adds "I am sure I am not fooling around. I am not trying to trap you in any shape or form"; then on Page 39 Sergeant Kelly asks "Is there anything else, Joe, you would like to tell us?" and the defendant Meehan's response was "No." And nevertheless Sergeant Kelly proceeded right along with the questioning, ignoring what had just been stated to him by the defendant; the defendant further told Sergeant Kelly that he "Got whacked out last night . . . on downers . . . Valium"; on Page 40, after Meehan denied anything happened between the victim and himself, there follows three statements by different police officers with no answers by the defendant. For example, just above the middle of the page on Page 40, the question: "Well, I don't know what to say to you, Joe. I told you all about what we have here. I told you about the witnesses, the door you went out. I don't know what more I can talk to you about." (No answer by the defendant.) The next statement in the transcript under question, "Joe, somebody said to me that you wanted to ask me a question. Is there something you want to know?" (No answer by the defendant.) Question: (Detective Madden) "Well, he did say, 'Suppose I tell you that I did it, you know, what bearing would that have on the case and what degree it would be.' We have no control over that. We go in and present the facts. Anyway, we are here to help." (No answer by the defendant.)

28. The next question appears to be a statement by Sergeant Kelly which begins at the lower third of Page 40, and goes down to the fifth line, inclusive, on Page 41. The next entry in the transcript on Page 41 under answer is the defendant's statement, "Can I go home and get some clothes?" And Sergeant Kelly's next question begins, "We will see that the clothes come to you. No problem there," etc.; going over to Page 42 of the transcript under the word question, "You told me you were on those pills and everything else. I don't know what bearing that would have on it. Are you still —", end of the question. The defendant Meehan responded "High from last night. A little jiggy." "But you still understand me, don't you?" Meehan's answer, "Yea." And when Sergeant Kelly asked, "Do you wish to tell me what the story was, Joe?" The defendant's answer, "Yea. But if I tell you, right, it is going to come out in the court?" Thereafter Sergeant Kelly makes a statement of how they have a good case and so forth, and Meehan's answer is, when Sergeant Kelly says "So it is up to you, Joe," his answer is "I don't know." And thereafter Sergeant Kelly begins the next paragraph with the statement, "You don't know what?" And then the transcript proceeds for eight or ten lines concluding that, "I have told you about the witnesses. I have told you about that. I wasn't hiding anything. I came out with it." On Page 45 the defendant Meehan's answer to the question "You did? Okay, then, you —", that being the end of the so-called question, Meehan's answering being "Does that mean I am railroaded in now, then to be convicted and everything now?" Sergeant Kelly's question, so-called, answers "No." And then the defendant Meehan said, "Why are you patting me on the back?" And the question (voice in the background) "Because you are telling the truth."

29. I have made these references to the statement of the defendant in the transcript in order to indicate that I came to

the conclusion that the defendant didn't really appreciate what was happending to him at that time and how much danger he was in at the hands of this very skillful police interrogation man. Sergeant Kelly indicated at different times that he was not trying to trick Meehan and he was not trying to con him, but I have come to the conclusion that the entire interrogation was very skillfully interwoven with long, many faceted statements, presumably supposed to have been in the form of a question and in these statements many different issues were referred to and raised, and in some instances the defendant merely responded "Yes" or "Yea." I find that Sergeant Kelly succeeded, and to use his own term, in trapping the defendant into making affirmative responses to questions, supposedly, which were so complex in form that an intelligent person would be incapable of knowing which aspect of Sergeant Kelly's statement the defendant Meehan was responding to. There were many references in the so-called statement of Meehan, as shown in the transcript, in which Sergeant Kelly was undertaking to create the appearance in the mind of Meehan that the Sergeant was a friend of his, was trying to help him, that if he admitted what he had done that it would assist him in his defense and in his case, and sprinkled throughout all these statements was the saving assertion that he couldn't promise him anything. In addition, when the defendant Meehan asked the several questions to which I made reference, Sergeant Kelly proceeded to brush right over them, particularly the statement in which Meehan was asked, as reflected on Page 39 of the transcript, "Is there anything else, Joe, that you would like to tell us?" and the defendant Meehan's answer was "No." At this point I rule that Sergeant Kelly was obligated under the rationale of the Miranda warning decision to halt immediately any further questions of this defendant. Sergeant Kelly proceeded to ignore that assertion and I have concluded that the defendant was incapable of competing with this type

of assault upon his mind and completely unprepared and incapable of asserting and insisting upon his rights under the Constitution. I find that Sergeant Kelly, in his very skillful and effective manner, completely overpowered the defendant Meehan so that he had no trouble at all in getting the defendant Meehan to agree to anything. The rationale of the Miranda warning decision is such as was designed to protect a young defendant, such as the defendant Meehan in this case.

30. I, therefore, have found by way of conclusion that the entire statement taken by Sergeant Kelly of the defendant Meehan is so infected with this overpowering broadside upon the defendant in very skillful police trained language that the statement by Meehan, in its entirety, should be stricken on the grounds that it was neither voluntary nor was it carried on with the principles of the Miranda case in mind. Therefore, the Motion to Suppress this statement is allowed in its entirety. In order that anyone making reference to this decision may have access to the interview of the defendant Meehan by Sergeant Kelly, I hereby incorporate by reference that part of Exhibit 14, beginning on Page 29 and concluding on Page 48, of that exhibit.

31. (D) *Miscellaneous*. There are other questions which have been raised by counsel for the defendant to which I shall make reference at this point. The defendant's counsel asserts that the defendant was denied effective assistance of counsel. There was no evidence that the defendant was informed that he was entitled to make a telephone call and, of course, I am unable to determine whether he would have called his mother or a lawyer. Nevertheless, the defendant's lawyer appeared on the scene at about 5:00 o'clock in the afternoon on June 11, 1976. After he talked to the defendant, he left at about 6:00 P.M. to take care of his Little League responsibilities and returned thereafter at about 11:00 P.M. Inasmuch as there is

no reference to the defendant attempting to call a lawyer or his mother or being denied this right, and at the same time there was no indication, as the government argues, that the defendant was discouraged concerning the question of a lawyer, I cannot impute to the police anything with reference to this particular aspect of the case and, therefore, I cannot rule that he was denied effective assistance of counsel. It appears that his lawyer wished to talk to the defendant and without the presence of a security officer, who is required under the Boston Police Department rules and regulations, to keep a prisoner such as the defendant who was in custody under his immediate control. The police officer informed the attorney that the rules of the Boston Police Department did not permit him to absent himself from the presence of the defendant or to remove himself so that he would not have a clear view of the defendant. I consider that to be an appropriate regulation of the Boston Police Department so that the security of a person who has been arrested on such a serious charge shall be maintained, particularly at this stage of the proceeding. I do not consider that to be an unreasonable regulation for the Boston Police Department to have, nor a position for the security officer himself to assert when the defendant's attorney wished to be left alone in District 5 with the defendant.

32. When the defendant's mother and his brother came to visit the defendant at District 5 Headquarters, there was some conversation between the defendant and his mother and brother. And I find that whatever statement was made spontaneously by the defendant to his mother, which was heard by a police officer, should not be suppressed for any reason presented by the defendant in this case. It is plain, and I so rule, that when a defendant makes a statement to his mother and/or brother or both of them such as has been claimed in this case and the questioning process has not been prompted or instituted by the police themselves, that when such statement

has been made and it is overheard by a police officer who is properly in the building and at the position he has assumed at the time, that such statement is not to be suppressed under those circumstances.

33. The defendant has raised, in addition, the question that when the defendant was at the police station his attorney requested a medical examination which would have included a blood test. There were no facilities for such an examination at that particular time at the District 5 Headquarters. And I rule that the failure to have a medical examination at that time and at that place does not constitute a deprivation of the defendant's rights under those circumstances. Counsel for the defendant has raised the question as to the validity of the warrant which the police obtained in order to get possession of the pants that the defendant was wearing at the time of the alleged incident. Inasmuch as the location of these pants was obtained as a result of the statement by the defendant to Sergeant Kelly which I have already suppressed, I rule that this warrant suffers by the same disability of illegality on that account and therefore the pants involved, as well as the underwear also obtained as a result of this warrant, are suppressed as well.

34. Therefore, with reference to the Motion to Suppress for the reasons stated in my Memorandum of Decision, the motion is allowed with reference to any statements of the defendant which appear in Exhibit 14, Pages 29 through 48, which is the statement of Joseph Meehan in its entirety as was obtained by Sergeant Kelly and which was dated Friday, June 11, 1976, and taken at 11:20 A.M. The defendant's motion to suppress the two sneakers, for reasons set out at length in my Memorandum of Decision, is hereby denied.

35. The defendant's motion to suppress the pair of pants which were seized at his home on June 11, 1976, for reasons set out in my Memorandum of Decision, is hereby allowed.

FRANCIS JOHN GOOD,
Justice, Superior Court.

Dated: August 5, 1977.
